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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 476

SEARS, ROEBUCK AND CO.,
Petitioner,
vs.
CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,
AND
FRANCIS SPERANDEO, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF TERMINAL FREIGHT HANDLING COMPANY, AND TERMINAL FREIGHT COOPERATIVE ASSOCIATION.

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INTEREST OF THE AMICI CURIAE.*

Terminal Freight Handling Company and Terminal Freight Cooperative Association (also herein called "Company" and "Association", respectively), were appellants in a case decided on December 18, 1969 by the Third Cir-

* This brief is filed with the written consent of all parties.

cuit Court of Appeals[1] which involved the same general question as that presented in the instant appeal relating to the rights and status of charging parties in proceedings under Section 10(l) of the National Labor Relations Act.[2]

The Association is a non-profit organization, consisting of forty-six (46) companies, which receives less-than-carload and less-than-truckload shipments, consolidates such shipments into carload lots and reships such goods to members' plants at various locations throughout the United States. Among the members of the Association are several companies, such as The Boeing Company, which are actively engaged in work for the national defense. Needless to say, the injuries which would be inflicted upon any of the member companies pursuant to an unlawful strike or boycott are so severe as to warrant their participation in this proceeding whose end result is likely to be a decisional rule affecting their ability to protect their vital in-

1. That case, filed in the Third Circuit on May 15, 1969 and docketed as Nos. 17,907 and 17,910, is entitled: *Bernard Samoff, Regional Director of the Fourth Region of the National Labor Relations Board, Petitioner-Appellee* v. *International Association of Machinists, District Lodge No. 1, Respondent-Appellee (Terminal Freight Cooperative Association, Charging Party-Appellant and Terminal Freight Handling Co., Charging Party-Appellant).*

2. Unfortunately, the Third Circuit's decision never reached the merits of the issues which that case (*Samoff*) had in common with the instant *Sears* case. Both the Board and the respondent union in *Samoff* moved the court to dismiss the appeal as being moot since the underlying dispute which gave rise to the alleged unlawful conduct involved there had been settled prior to oral argument. The court granted these motions to dismiss on December 18, 1969, over the vigorous opposition of appellants, and despite the fact that the merits of the appeal had been thoroughly briefed and orally argued. Appellants are currently preparing a motion to the Third Circuit for reconsideration or rehearing *en banc* on the question of mootness. This motion will urge, in part, that the very same arguments which were successfully made by the Board in support of their contention of mootness in the Third Circuit were without success when made by the Board to this Court in the present proceeding involving an analogous factual posture.

terests in the event of the occurrence of the described unlawful conduct.

The Company is a non-profit Delaware corporation engaged in the handling, consolidation and trans-shipment of freight as manager of the Association. It operates thirty-six (36) terminal facilities in twenty-four (24) States and the District of Columbia.

In the *Samoff* case, just as in the instant *Sears* case, charges were filed with the National Labor Relations Board alleging that the charged respondent-union was engaging in an unlawful secondary boycott in violation of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U. S. C. § 158(b)(4)(B). The Regional Director found merit in the charges and, pursuant to his mandatory duty under Section 10(l) of the Act, petitioned the district court for appropriate injunctive relief. However, prior to the district court's hearing on the injunction petition, the Regional Director and the respondent-union agreed to a Stipulation providing that the union would cease its alleged unlawful conduct. The Regional Director then moved the district court to approve this Stipulation in lieu of conducting a hearing on its petition and granting injunctive relief. The Company and the Association, charging parties before the Board, opposed the approval of the Stipulation whose effect would be to deprive them of the protection of a court-ordered injunction and the potential sanction of contempt connected therewith. The district court judge declined to hear and consider the charging parties' objections, however. He predicated his refusal on the ground that they did not possess the status of "parties" in the district court proceeding; that is, they were not "parties" and had not moved to "intervene", although their counsel had filed an appearance in the case. Therefore they were asserted to lack standing to be heard.

The judge incorporated this ruling in his Order approving the Stipulation:

> "The Stipulation of Petitioner [the Regional Director] and Respondent as modified and initialed by them is hereby approved over objection of Terminal Freight Cooperative Association and Terminal Freight Handling Co., Charging Parties, who, having entered their appearances by counsel but who have not moved to intervene, do not constitute parties and lack standing to be heard on their objections."

Thus the charging parties were not permitted to protest what they viewed as the Regional Director's compromise of his original position in which he sought a hearing on his Petition and an Order of Court granting injunctive relief, which compromise had resulted in damage to their essential interests and deprived them of the specific relief to which Section 10(l) entitled them.

The Company and the Association, the charging parties, appealed the judge's Order to the Third Circuit on the ground that they were denied their rights as "parties" to the proceedings in the District Court, the existence of which status obviated any need to seek to intervene in that court, and were thereby deprived of rights guaranteed them in Section 10(l) of the Act.

The Board moved to dismiss the appeal in the Third Circuit on two grounds which are relevant here[3]. First, charging parties lack standing to appeal *either* the alleged denial of rights conferred upon them in the district court by Section 10(l) or the result reached by the district court judge; this lack of standing was said to be a consequence of the statute's failure expressly to accord them such appellate rights. Second, the Norris-LaGuardia Act, 29 U. S. C. §§ 101-115 (1932), bars any efforts by private parties to

3. The Board's third ground, of course, was the alleged mootness of the appeal.

secure injunctive relief, whether by an initial application to the court or by an effort to correct an erroneous refusal to grant such relief pursuant to a petition filed by the Board by means of appellate review.

It is clear, therefore, that the legal issues posed in the Third Circuit are identical to those involved in the instant appeal by Sears and that a decision on the merits in the latter case will control the disposition of the former, assuming the contention of mootness in *Samoff* may be overcome.

Moreover, the need for determining the nature and limits of charging parties' appellate rights under Section 10(l) can best be understood by appreciating the various contexts in which the issue arises and in which the impact of a resolution will be felt. It is, further, in the interest of all parties whose rights will be directly affected by the result in this case that this Court be apprised of the varying situations which its decision will control and for whose resolution it should therefore be tailored.

ARGUMENT.

I. The Range of Charging Parties' Interests Involved in Proceedings Under Section 10(l) Requiring Recognition, Clarification and Protection.

The ramifications of a determination of charging parties' judicial rights under Section 10(l) of the Act are important, manifold and undecided by this Court.

In *United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 283* v. *Scofield et al.; United Automobile, Aerospace and Agricultural Implement Workers et al.* v. *Fafnir Bearing Company et al.*, 382 U. S. 205, this Court delared the *right*, after a final Board order, of successful charging parties

to intervene and participate as full "parties" in the appellate consideration of their cases notwithstanding the Board's participation on their behalf. Section 10(f) of the Act confers an equivalent right upon unsuccessful charging parties.

The question posed under Section 10(l) is whether any such rights exist on behalf of charging parties when the judicial consideration of their charges occurs prior to a final Board order. It is submitted that the rationale of *Scofield* and *Fafnir* compels the extension of this Court's recognition of charging parties' vested rights in the judicial litigation of their charges to all stages of that process.

Although the Tenth Circuit sought to distinguish *Scofield* and *Fafnir* on the grounds that they dealt with the securing of permanent injunctive relief via the review or enforcement of final Board orders under Sections 10(e) and (f), rather than the securing of temporary injunctive relief under Section 10(l), the attempted distinction is without merit. First, *Scofield* argued in terms of general truths concerning this right to be heard fully and effectively. The exercise of this right should not depend upon whether the hearing is on a request for needed permanent or needed temporary relief. Second, Sction 10(h) of the National Labor Relations Act exempts from the operation of the Norris-LaGuardia Act *all* federal court proceedings authorized under Section 10—including 10(e), (f), (j) and (l)—so that no distinction between suits for permanent relief (10(e) and (f)) and temporary relief (10(l)) can be predicated upon Norris-LaGuardia. Third, the basis for permitting charging parties to participate in proceedings under 10(e) and (f) apply equally to 10(l), *i.e.* to prevent harm to the charging party through an adverse decision to which the charging party was not a full and effective participant at *all* levels of the judicial process. The damage which an

unlawfully boycotted employer may suffer who is unable to secure temporary injunctive relief from an illegal strike is no less than the damage he may suffer as a consequence of a final order of the Board. Surely, mere speculation as to the difference, if any, in the quantum of damage suffered cannot serve as the basis for denying the right to the fullest possible participation by the charging party to further and protect his jeopardized vital interests.

It follows, therefore, that the logic of *Scofield* applies as well to cases under Section 10(l) especially where, as here, the Board declines to represent the charging parties' interests.

The problem of fixing charging parties' rights under Section 10(l) has arisen in a variety of contexts. The *Sears* case in the Tenth Circuit involved the right of charging parties under Section 10(l) to appeal an adverse order of the District Court when the Board refused to appeal. The pending *Samoff* case in the Third Circuit deals with the rights of charging parties to appeal the district court's erroneous refusal to permit them to exercise there the participatory role expressly granted them in Section 10(l), as well as to appeal the district court's refusal to grant injunctive relief. The question in *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (CA 9, 1965), concerned the extent to which charging parties could perform an independent role in the district court in support of the Board's petition for an injunction after the Board changed its mind about pursuing the relief sought in its own petition. *Houston Insulation Contractors Association* v. *NLRB*, 339 F. 2d 868 (CA 5, 1964), involved a charging party's attempt to secure a stay of a Board order in the Court of Appeals, the effect of which would be to continue in force an injunction granted under Section 10(l) which would otherwise have expired. And

in *San Francisco-Oakland Newspaper Guild* v. *Kennedy*, ... F. 2d ....., 69 LRRM 2535 (CA 9, 1968), a successful charging party sought to intervene in the Appellate Court in an action brought by a union to review the district court's grant of injunctive relief under Section 10(l).

Although each of these cases involved a somewhat different question from the others, yet they are alike in that the result in each hinged on an interpretation of the rights accruing to charging parties under Section 10(l) of the Act.

The variety of situations in which charging parties' rights depend upon an analysis of the meaning of that Section and the diversity among the Court of Appeals' decisions which have undertaken such an analysis requires clarification. Thus the Tenth Circuit in the *Sears* case prohibited charging parties from appealing a denial of the Board's petition for injunctive relief principally in reliance upon the alleged requirements of Norris-LaGuardia,[4] while the Ninth Circuit in *Retail Clerks* held Norris-LaGuardia to be irrelevant to charging parties' efforts to support the Board's petition in the courts. Although the Fifth Circuit in the *Houston* case expressly reserved decision on the applicability of Norris-LaGuardia to charging parties' efforts to obtain injunctive relief via a stay, both the court's language and its action in granting the stay strongly suggest that it would not find Norris-LaGuardia to constitute a bar in cases where the Board had itself filed a petition for such relief at an earlier stage in the case. And whereas this Court in *Scofield* accorded successful charging parties equal status in the appellate courts with those who had not been successful, the later Ninth Circuit

4. The *Sears* case appears to constitute the first instance in which a charging party before the Board has argued that it enjoyed the status of a "party" in 10(l) cases without the need, therefore, for seeking to intervene in order to protect its rights.

decision in *San Francisco-Oakland* refused to do so by denying charging parties the right to intervene at the appellate stage of Section 10(l) litigation.

Accordingly, in recognition of the range of problems which have arisen, and which will continue to arise in the absence of this Court's illumination of charging parties' judicial and appellate rights under Section 10(l), together with the need to harmonize the conflicting decisions of the Courts of Appeals which have explored the breadth of those rights, the decisional rule which this Court will announce in this case should embrace and dispose of each of the enumerated issues presented in the foregoing cases.

With respect to the contents of that rule, the *amici* respectfully suggest that charging parties should be deemed party litigants in proceedings under Section 10(l) just as they are in all other proceedings, both before the agency itself and in the courts, which are authorized by the Act. There is no sound reason for conferring a lesser status on charging parties in litigation pursuant to 10(l) than in such other litigation and proceedings; their interest in the outcome is as great, if not greater due to the business consequences of an unlawful boycott or unlawful picketing; their rights which are involved, both public and private, are as real and are equally entitled to protection; and the due process requirement that one who is conferred a right should have a forum in which to enforce and protect it applies as well to the existence of appellate rights under Section 10(l) as it does elsewhere in the Act where such appellate rights are conferred.

II. The Tenth Circuit's Decision Represents a Retrogressive Step in the Judicial Evolution of Charging Parties' Rights.

There has been recently an expanding awareness in the courts of the legitimate rights and interests of charging parties under the Act. The decision of the Tenth Circuit constitutes an anomalous retreat from the movement of those courts.

The Ninth Circuit's decision in *Retail Clerks* represented an effort to move the discussion of charging parties' rights from the level of cliché to that of an awareness of their legitimate right to participate in proceedings governing their essential interests.

Scofield represented further movement in that direction as this Court recognized for the first time the right of successful charging parties to continue to represent their interests in appellate proceedings. In the course of doing so, this Court acknowledged the irrelevance of doctrines which had limited charging parties' participation since the early days of the National Labor Relations Act, such as the concept that the statute recognized and enforced only "public" rights.

Other courts have participated in this movement. For example, in *Leeds and Northrup* v. *N. L. R. B.*, 357 F. 2d 627 (CA 3, 1966), the Third Circuit overturned a long-standing Board practice by declaring that charging parties were entitled to an evidentiary hearing on their objections to unilateral settlement agreements which the Board in its alleged unreviewable discretion had regularly taken over the charging parties' futile objections. Henceforward charging parties are entitled to a record upon which they may seek appellate review.

Even the Board has recognized this development as, for

example, in *Spector Freight*, 141 NLRB 1110 (1963), in which it acceded to a greater role by the charging party in examining witnesses in Board hearings.

In the light of this evidence of the current of the law, the Tenth Circuit's refusal to recognize charging parties' status as party litigants before it, and to permit them to be heard on matters affecting their vital interests, both represents a return to limiting and formalistic doctrines which have been increasingly discarded by our courts and ignores the requirements of due process and of the settled decisional authority which has recognized and participated in that development of the law.

CONCLUSION.

For the foregoing reasons the *amici* urge this Court to reverse the decison of the court below denying petitioner's standing to seek appellate review from an adverse district court decision denying them appropriate injunctive relief under Section 10(l).

Respectfully submitted,

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